

HEARSAY EXCEPTIONS—IT IS HEARSAY AND WE DON'T CARE.

I. EXCEPTIONS BASED ON LACK OF TIME OR SUBJECTIVE CONCERNS

A. PRESENT SENSE IMPRESSION—Rule 803(1)

1. ELEMENTS OF THE EXCEPTION

1. A statement
2. Describing or explaining an event or condition
3. Made while the declarant was perceiving the event or condition, or immediately thereafter.

2. LIMITATIONS

A present sense impression is only admissible if made in a timely manner. The timeliness of the making of the statement is designed to reduce the opportunity for fabrication or manipulation. This exception recognizes that in many, if not most instances, precise contemporaneity is not possible and hence a slight lapse is allowable. *State v. Odom*, 316 N. C. 306, 341 S. E. 2d 332 (1986).

3. BASIS FOR THE EXCEPTION

The underlying theory of the Present Sense Impression Exception is that the substantial contemporaneity of the event and the statement negates the likelihood of deliberate and conscious misrepresentation. *State v. Odom*, 316 N. C. 306, 341 S. E. 2d 332 (1986); *State v. Smith*, 152 N. C. App. 29, 566 S. E. 2d 793 (2002).

B. EXCITED UTTERANCE—Rule 803(2).

1. ELEMENTS OF THE EXCEPTION

1. A statement
2. Relating to a startling event or condition
3. Made while the declarant was under the stress of excitement caused by the event or condition.

2. BASIS FOR THE EXCEPTION

The rationale for the admissibility of an excited utterance is its truthfulness. Circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *State v. Reid*, 335 N. C. 647, 440 S. E. 2d 776 (1994); *State v. Wingard*, 317 N. C. 590, 346 S. E. 2d 638 (1986). The trustworthiness of this type of utterance lies in its spontaneity. There is simply no time to fabricate or contrive statements made during the excitement of the event. *State v. Reid*, 335 N. C. 647, 440 S. E. 2d 776 (1994).

C. THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION—
Rule 803(3).

1. ELEMENTS OF THE EXCEPTION

1. A statement
2. Of the declarant's then existing
3. State of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health).

2. LIMITATION

Rule 803(3) specifically does not include "a statement of memory or belief to prove a fact remembered or believed."

3. BASIS FOR THE EXCEPTION

The policy behind the state of mind hearsay exception is that there is a fair necessity for lack of other better evidence to resort to a person's own contemporary statements of his mental or physical condition and that such statements are more trustworthy than the declarant's in-court testimony. *State v. Hardy*, 339 N. C. 207, 451 S. E. 2d 600 (1994). The declarant's declarations at the time are often more trustworthy than the declarant's testimony given after a lapse of time and under the influence of self-interest. *Brandis and Broun*, North Carolina Evidence, 6th ed., Section 217.

II. BUSINESS AND PUBLIC RECORDS

A. BUSINESS RECORDS—Rule 803(6)

1. ELEMENTS OF THE EXCEPTION

1. A memorandum, report, record, or data compilation in any form
2. Of acts, events, conditions, opinions or diagnoses
3. Made at or near the time
4. By, or from information transmitted by, a person with knowledge of the acts, events, conditions, opinions or diagnoses
5. If kept in the course of a regularly conducted business activity
6. If it was the regular practice of that business activity to make such a document
7. As shown by the testimony of the custodian or other qualified witness

2. LIMITATION

Business records are not within the exception if the source of the information or the method or circumstances of its preparation indicate a lack of trustworthiness.

3. BASIS FOR THE EXCEPTION

Trustworthiness is the foundation of the business records exception. *State v. Galloway*, 145 N. C. App. 555, 551 S. E. 2d 525 (2007); *Miller*, 80 N. C. App. 425, 342 S. E. 2d 553 (1986).

4. GENERAL COMMENTS

1. The person who prepared the document is not an essential witness. The foundation for the admission of the documents can be provided by a person who is familiar with them or the practices of the business. *State v. Rupe*, 109 N. C. App. 601, 428 S. E. 2d 480 (1993). The authenticity of the records may also be established circumstantially. See *State v. Wilson*, 313 N. C. 516, 330 S. E. 2d. 450 (1985).
2. Hearsay within hearsay or multiple hearsay or double hearsay issues frequently arise with business records.

B. PUBLIC RECORDS AND REPORTS—Rule 803(8)

1. ELEMENTS OF THE EXCEPTION

1. Records, reports, statements or data compilations, in any form
2. Of public offices or agencies
3. Setting forth
 - i. The activities of the office or agency
 - ii. Matters observed pursuant to a duty imposed by law as to which matters there was a duty to report
 - iii. In civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

2. LIMITATIONS

1. Item ii above is limited in that documents may not be admitted under that provision as to “matters observed by police officers and other law enforcement personnel.”
2. The Public Records exception is inapplicable if the sources of the information or other circumstances indicate a lack of trustworthiness. This applies to all three of the itemized sub-elements listed above.

3. BASIS OF THE EXCEPTION

The rule is premised on the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. If sufficient negative factors are present to indicate the report is not trustworthy, it should not be admitted." *State v. Acklin*, 317 N. C. 677, 346 S. E. 2d 481 (1986).

The rationale behind the exclusion of police reports is to prevent prosecutors from attempting to prove their cases in chief simply by putting into evidence police officer’s reports of their contemporaneous observations of crime. The underlying theory is that observations by

police officers at the scene of the crime may not be as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases. *State v. Harper*, 96 N. C. App. 36, 384 S. E. 2d 297 (1989).

C. RECORDED PAST RECOLLECTION---Rule 803(5)

1. ELEMENTS OF THE EXCEPTION

1. A memorandum or record
2. Concerning a matter about which a witness once had knowledge
3. But now has insufficient recollection to enable him to testify fully and accurately
4. Shown to have been made or adopted by the witness when the matter was fresh in his memory
5. That reflects that earlier knowledge correctly.

2. LIMITATION

If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. This limitation is imposed to “prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined.” Commentary to Rule 803(5). Dean Brandis characterized this limitation as “puristic, juristic mumbo-jumbo.” Brandis, Section 224. Broun disagrees with Brandis’ earlier assessment.

3. COMMENT

This rule differs from refreshing a witness’ recollection. When a witness’ recollection is refreshed by the process of showing a witness a document, the witness is actually testifying from the witness’ memory that has been triggered by the review of the document. Under Rule 803(5), the witness has no present memory and the earlier writing is the only evidence that is being offered.

III. ESTABLISHED REFERENCE MATERIALS

A. MARKET REPORTS AND COMMERCIAL PUBLICATIONS—Rule 803(17)

1. ELEMENTS OF THE EXCEPTION

1. Market quotations, tabulations, lists, directories or other published compilations.
2. Generally used and relied upon by the public or by persons in particular occupations.

2. BASIS FOR THE EXCEPTION

The case law is sparse on this exception. The Commentary to Rule 803 observes in connection with this exception that “(t)he basis of trustworthiness is general reliance by the public or by a particular segment

of it, and the motivation of the complier to foster reliance by being accurate.”

B. LEARNED TREATISES—Rule 803(18)

1. ELEMENTS OF THE EXCEPTION

1. Statements contained in published treatises, periodicals or pamphlets
2. On a subject of history, medicine or other science or art
3. Established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

2. LIMITATIONS

1. Procedurally, the material must be called to the attention of the expert witness upon cross-examination or relied upon by the expert in direct examination.
2. The learned treatise may be read into evidence but it may not be admitted or received as an exhibit.

3. BASIS FOR THE EXCEPTION

The case law in North Carolina does not explicitly explain the basis for this exception. The Commentary to Rule 803(18) notes that the reliability of such treatises is based on several factors including that the material is written primarily and impartially for professionals, is subject to scrutiny and exposure for inaccuracy and that the reputation of the writer of the material is at stake.

IV. REPUTATION EVIDENCE

A. REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY—Rule 803(19)

1. ELEMENTS OF THE EXCEPTION

1. Reputation
2. Among members of his family by blood, adoption, or marriage, or among his associates, or in the community
3. Concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of his personal or family history.

B. REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY—Rule 803(20)

1. ELEMENTS OF THE EXCEPTION

1. Reputation
2. In a community
3. Arising before a controversy

4. As to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which it is located.

C. REPUTATION AS TO CHARACTER—Rule 803(21)

1. ELEMENTS OF THE EXCEPTION

1. Reputation
2. Of a person's character
3. Among his associates or in the community

These hearsay exceptions seem to be premised on the idea that the collective assessment of a larger group of people may be more reliable and trustworthy than the opinion of a single individual. Also, it would be difficult to present this evidence without carving out an exception to the hearsay rule. A large number of individuals would be required to testify to present the same information that a single witness could offer.

V. UNAVAILABILITY EXCEPTIONS

A. DEFINITION OF UNAVAILABILITY—Rule 804(a)

Unavailability as a witness includes situations in which the declarant:

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
2. Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
3. Testifies to a lack of memory of the subject matter of his statement; or
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

1. PRIVILEGE—Rule 804(a)(1)

This subject will be addressed more eloquently and eruditely by Justice Paul Newby in another session of this program.

2. REFUSAL TO TESTIFY—Rule 804(a)(2)

The procedure that should be followed by the trial court when faced with a witness's refusal to testify is (1) the issuance of an order, outside the presence of the jury, directing the witness to testify and (2) a warning that continued refusal to testify despite the court's order would be punishable by contempt. See State v. Linton, 145 N. C. App. 639, 551 N. C. App. 572 (2001).

3. LACK OF MEMORY—Rule 804(a)(3)
The Commentary to Rule 804 notes that the lack of memory must be established by the testimony of the witness which clearly contemplates the production and questioning of the witness who claims a lack of memory.
4. DEATH OR DISABILITY—Rule 804(a)(4)
5. ABSENCE—Rule 804(a)(5)
As to this requirement, a witness is not 'unavailable' for purposes of this exception unless the proponent of the evidence has made a *good-faith effort* to obtain his presence at trial. The length to which the proponent of the evidence must go to produce a witness is a question of reasonableness. Ultimately, the question is whether the witness is unavailable *despite* good faith efforts undertaken prior to trial to locate and present that witness. The proponent of the evidence bears the burden of establishing this evidentiary predicate. See *State v. Grier*, 314 N. C. 59, 331 S. E. 2d 669 (1985). The test, however, is not that the prosecution must exhaust all conceivable means in the effort to locate a witness, but only that they undertake, in good faith, *some* reasonable, affirmative measures to produce the witness for trial. *Id.*

If the unavailability of the declarant is procured by the proponent of the evidence, then this requirement is not satisfied. Commentary to Rule 804.

B. SPECIFIC UNAVAILABILITY EXCEPTIONS

1. FORMER TESTIMONY—Rule 804(b)(1)
 - a. ELEMENTS OF THE EXCEPTION
 1. Testimony given as a witness
 2. At another hearing or a deposition
 3. Of the same or a different proceeding
 4. If the party against whom the testimony is now offered had an opportunity and a similar motive to develop the testimony during questioning.
 - b. BASIS FOR THE EXCEPTION
This exception is based on the need for the evidence and the practical reality that former testimony which was subject to challenge by the party against whom the evidence is now being offered is as trustworthy as evidence presented in the present proceeding.
2. DYING DECLARATIONS—Rule 804(b)(2)
 - a. ELEMENTS OF THE EXCEPTION
 1. A statement
 2. Made by a declarant
 3. While believing that his death was imminent

4. Concerning the cause or circumstances of what he believed to be his impending death.

b. **BASIS FOR THE EXCEPTION**

The theory on which dying declarations are excepted from the hearsay rule and admitted in evidence is that the declaration is made under the realization of approaching death, when there is no longer any motive for making a false statement, thus creating a sanction for truth equal to that of an oath. The North Carolina Supreme Court commented once that the nearness and certainty of death are just as strong an incentive to the telling of the truth as the solemnity of an oath. *State v. Jefferson*, 125 N. C. 712, 715, 34 S. E. 648, 649 (1899). Perhaps a more potent reason, one strong enough to supersede the right of confrontation, so strongly entrenched in our law, is the necessity of preserving important evidence, which often could come from no other source, of the identity of the killer and such circumstances of the killing as come within the range of the exception. *State v. Stevens*, 295 N. C. 21, 243 S. E. 2d 771 (1978). The rationale for the admission of these statements clearly rests upon a belief in the general trustworthiness of dying declarations, rather than upon the necessity for bringing to justice the perpetrators of secret homicides." *State v. Lester*, 294 N. C. 220, 240 S. E. 2d 391 (1978).

3. **STATEMENT AGAINST INTEREST**—Rule 804(b)(3)

a. **ELEMENTS OF THE EXCEPTION**

1. A statement
2. Which at the time of its making
3. Was so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another
4. That a reasonable man in his position would not have made the statement unless he believed it to be true.

b. **LIMITATION**

A statement under this rule tending to expose a declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

c. **BASIS FOR EXCEPTION**

The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to them unless satisfied for good reasons that they are true. *State v. Levan*, 326 N. C. 155, 388 S. E. 2d 429 (1990); N.C.G.S. § 8C-1, Rule 804(b)(3), comment (quoting Advisory Committee's Note)

VI. CATCH-ALL EXCEPTIONS

A. GENERAL CATCH-ALL EXCEPTION—Rule 803(24)

1. ELEMENTS OF THE EXCEPTION

The North Carolina Supreme Court defined the six requirements of this exception in *State v. Smith*, 315 N. C. 76, 337 S. E. 2d. 833 (1985), as follows:

- (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
- (2) That the statement is not covered by any other hearsay exception;
- (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
- (4) That the proffered statement is offered as evidence of a material fact;
- (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
- (6) Whether "the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

2. LIMITATIONS

The issue of trustworthiness focuses on certain factors. The trial court, when evaluating whether the evidence possesses "equivalent circumstantial guarantees of trustworthiness" should consider the following factors: (1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth, (3) whether the declarant recanted, and (4) the reason for the declarant's unavailability. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). Also pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties. *State v. Triplett*, 316 N. C. 1, 340 S. E. 2d 736 (1986). This listing of factors is not all inclusive and other factors may be considered when appropriate. *State v. McLaughlin*, 316 N. C. 175, 340 S. E. 2d 102 (1986).

When hearsay testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party "sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement." The hearsay statement may not be admitted unless this notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the "particulars" of the hearsay testimony, and (3) the name and address of the declarant. *State v. Smith*, 315 N. C. 76, 337 S. E. 2d 833 (1985). The

notice requirement should be construed flexibly in light of the express policy under the rule of providing a party with a fair opportunity to meet the evidence. See *State v. Nichols*, 321 N. C. 616, 365 S. E. 2d 561 (1988).

The consideration of the probativeness of the evidence has two components. The requirement imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and is the statement more probative on the point than other evidence that the proponent could reasonably procure? *State v. Smith*, 315 N. C. 76, 337 S. E. 2d 883 (1985).

In conducting this analysis, the trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness, because they embody the ...test for the admission of hearsay ..., i.e., necessity and trustworthiness. On the other four issues, the trial court must make conclusions of law and give its analysis. The appellate courts will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied. *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988). The trial court must make factual findings and conclusions of law on the first, third and fifth elements of the test for the admission of catch-all hearsay evidence and only conclusions of law are required for the second, fourth and sixth elements of the above quoted test.

3. BASIS FOR THE EXCEPTION

The elements of this exception reflect a focus on the trustworthiness of the evidence being offered and a concern for the proponent's need to offer the evidence in the interests of justice. The two primary concerns are trustworthiness and necessity.

B. UNAVAILABLE DECLARANT CATCH-ALL EXCEPTION—Rule 804(b)(5)

Rule 803(24) and Rule 804(b)(5) are identical apart from the requirement in the latter rule that the declarant must be unavailable. When the declarant is unavailable, the necessity for admitting the hearsay evidence is greater than under Rule 803(24) and the inquiry into the probative value of the evidence may be less strenuous. *State v. Faucette*, 326 N. C. 676, 392 S. E. 2d 71 (1990).

1. ELEMENTS OF THE EXCEPTION

In *State v. Triplett*, 316 N. C. 1, 340 S. E. 2d 736 (1986), the North Carolina Supreme Court applied the six part inquiry established in *State v. Smith* that is set out above to Rule 804(b)(5).

2. LIMITATIONS

The unavailability of the declarant weighs against the introduction of the evidence if the declarant is unavailable because he cannot be located. See *State v. Nichols*, 321 N. C. 616, 365 S. E. 2d 561 (1988). If the declarant is unavailable under Rule 804(b)(2) because he persists in refusing to testify concerning the subject matter of his statement despite a court order to do so, the court must weigh this as a factor against admitting the

declarant's statement. *State v. Swindler*, 339 N. C. 469, 450 S. E. 2d 907 (1994).